

Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, and Swanson

From: Natalie Bocanegra, Staff Counsel, Legal Division
Lawrence Woodlock, Senior Staff Counsel, Legal Division
Luisa Menchaca, General Counsel

Subject: Payments for “Member Communications”: Prenotice Discussion of Proposed Regulation 18531.7 and Amendments to Regulations 18215 and 18225

Date: March 7, 2002

I. Introduction

Payments for communications supporting or opposing a candidate or ballot measure typically are reportable “contributions” or “expenditures” under the Political Reform Act (the “Act”).¹ (§§ 82015 and 82025.)² Section 85312, enacted by Proposition 34 and later amended by Senate Bill 34, provides an exception to this general rule for “member communications.”³

As amended, § 85312 provides:

For purposes of this title, payments for communications ~~for purpose of this title~~ to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purpose of supporting or opposing a candidate or a ballot measure are not contributions or ~~independent~~ expenditures, provided those payments are not made for general public advertising such as broadcasting, billboards, and newspaper advertisements. However, payments made by a political party for communications to its members who are registered with that party which would otherwise qualify as contributions or expenditures shall be reported in accordance with Article 2 (commencing with Section 84200) of Chapter 4, and Chapter 4.6 (commencing with Section 84600), of this title.

Uncertainty concerning the scope of this section has prompted much discussion regarding its application. Staff held four interested persons’ meetings on § 85312 in May, August and December of 2001.

¹ All references are to the Government Code.

² Sections 82015 and 82025 provide the definitions for contribution and expenditure respectively. These sections are further interpreted by regulations 18215(a)(1) and 18225(a)(1).

³ “Member communications” refers to communications to members, employees, and shareholders of an organization or families of those persons.

Staff noticed regulations prescribing the scope of the exception and defining various terms used in the statute. However, staff found that the regulations, as the statute itself, did little towards identifying the duties of the persons who *pay* for the communications referenced in the statute (“payers”). It is those persons whose obligations under the Act may be affected by the statute, and whose identification is critical in determining the scope of § 85312. These issues were presented at the January 2002 Commission meeting during which staff pointed out that the exception provided by § 85312 might impact committee formation, campaign disclosure, and contribution limits. At that meeting, the Commission identified ambiguous terms in the statute and considered the following possible interpretations, together with their implications for payments made by committees:

- **Broad Approach.** Considered by itself, § 85312 could be read to relieve all existing committees from disclosure obligations relative to member communications.
- **Narrow “Exclusion Approach.”** Based on extrinsic evidence, § 85312 could be construed to exclude committees from the scope of the exception. As a result, committees would continue to be subject to prior disclosure rules. This approach could also result in the elimination of the regulatory “newsletter exception” for any committee formed under subdivisions (b) and (c) of § 82013. The “newsletter exception” excludes from the definitions of contribution (§ 82015) and expenditure (§ 82025) regularly published newsletters of organizations.
- **Narrow “Newsletter Exception Approach.”** Section 85312 could also be construed as an expanded codification of the “newsletter exception” merely adding new forms of communication to the exception. (Regs. 18215(c)(9) and 18225(b)(4).)

The Commission rejected each of these three approaches and instead directed staff to develop an alternative approach similar to the “Newsletter Exception Approach” discussed in staff’s January 2002 memorandum, but which focuses on a regulatory definition of “organization” and “member.” Proposed regulation 18531.7 was drafted with this approach in mind. Additional issues addressed in the proposed regulation are:

- How narrowly or broadly should certain terms in the statute be defined;
- Which costs for communications are subject to the exception of § 85312 and should the Commission include *de minimis* rules to prevent inadvertent violations of the statute;
- Should the regulation provide for special rules prohibiting earmarked payments by third parties to prevent circumvention of the Act’s contribution and voluntary expenditure limits; and
- How does § 85312 interact with § 82015(b)(1) and (2), defining contributions, when a payment for member communications is made at the behest of a candidate or committee which the communication will benefit.

II. Regulation 18531.7

Regulation 18531.7 is structured as follows:

Subdivision (a) defines what is meant by a “payment for communications” and the term “organization” for purposes of § 85312. Subdivision (b) describes which payments count as payments for communications under the statute and would require certain recordkeeping. Subdivision (c) provides specific rules for whether or not a payment made in a particular manner is or is not a contribution or expenditure under § 85312. Subdivision (d) is a bracketed subdivision to address committee reporting issues.

Subdivision (a) – Identifying the Payer for “Member Communications”

Subdivision (a) provides the general rule for payers of member communications and references certain communications that are frequently used to convey support of or opposition to a candidate or ballot measure. Subdivision (a) states that for purposes of § 85312 a “payment for communications” is any payment:

“... made by an organization for communications including newsletters, letters, fliers, and other forms of communications to its members, employees, or shareholders, or to the families of its members, employees, or shareholders.”
(Emphasis added.)

Consistent with the language of § 85312, subdivision (a) also states that a payment for communications does not include any payment made by an organization for general public advertising, such as broadcasting, billboards, and newspaper advertisements, or for communications to any person who is not a member, shareholder, or employee, or family member of such a person notwithstanding subdivision (b)(2), discussed later.

Subdivision (a) also identifies persons who make a payment pursuant to § 85312 by providing a definition for “organization” based on the definition of “person” under § 82047. A political party is not included in this definition of organization since § 85312 contains a specific provision requiring reporting of member communications by political parties to members who are registered with the party. Therefore, it is not necessary for the regulation to address this group. Candidates and individuals are also excluded.

The rule for organization membership is provided at subdivision (a)(2) and is based on Federal Election Commission regulations. It requires that members meet the express qualifications of the organization and have the authority and ability, through access to the entity’s organizational documents, to participate in governance of the organization. Additionally, this rule requires organizations to solicit persons to become members, as opposed to merely identifying persons as “members.” Finally, an organization comprised of 25 or fewer members would be presumed to have members for purposes of § 85312

Decision 1 – Should Organization Be Defined to Include Committees?

Subdivision (a)(1) has an important decision point. Because committees are organizations that are created for political purposes, unlike ordinary membership groups, **Decision 1** addresses how committees⁴ are to be treated for purposes of § 85312 and this regulation. Subdivision (a)(1) has bracketed language that would exclude committees from the definition of organization for purposes of § 85312. The decision point is illustrated in the chart and discussed below.

Determination	§ 85312 Exception
Reject bracketed language -- Committees are included in the definition of “organization”	Committees will not report payments for “member communications” as a contribution or expenditure. (If the Commission determines that recipient committees may and should report payments for member communications as expenditures, language in proposed subdivision (d) should be included and regulations 18215 (defines “contribution”) and 18225 (defines “expenditure”) should be amended to delete the “newsletter exception.”)
Include bracketed language – Committees are excluded from the definition of “organization”	Section 85312 does not govern payments made by committees. The status quo for disclosure by committees is maintained. Minor amendments to regulations 18215 and 18225 are necessary.

As used elsewhere in the Act and regulations, the term “organization” encompasses political committees. (See, e.g., § 82047 (defining “person” to include “committees and any other organization or group of persons acting in concert”); regulation 18215(a)(2)(D) (defining “contribution” to include a payment received by “an organization formed or existing primarily for political purposes, including, but not limited to, a political action committee established by any membership organization....”)) Therefore, under existing statutory and regulatory schemes, authority exists to include committees within the scope of § 85312.

However, staff believes the Commission has authority to continue to require reporting of these payments by persons that qualify as recipient committees under the Act even if they are considered “organizations” for purposes of § 85312. Under existing law and longstanding Commission rules, a committee reports all its payments by virtue of having been established as an entity that exists primarily for political purposes. (§§ 82015 and 82025; regulations 18215(a) and 18225(b).) As such, recipient committees are required to file periodic reports disclosing all payments made, and all payments received. (§§ 84200-84204, 84211; *Karnette* Advice Letter, No. I-87-192; *Olson* Opinion, No. O-01-112.) Recipient committees are required to make an itemized disclosure all payments of \$100 or more as part of the committee’s cash balance

⁴ Section 82103 defines the term “committee” and provides: “ ‘Committee’ means any person or combination of persons who directly or indirectly does any of the following:

“(a) Receives contributions totaling one thousand dollars (\$1,000) or more in a calendar year.

“(b) Makes independent expenditures totaling one thousand dollars (\$1,000) or more in a calendar year; or

“(c) Makes contributions totaling ten thousand dollars (\$10,000) or more in a calendar year to or at the behest of candidates or committees.”

reporting. (§§ 84211(e) and (k).) This reporting by a recipient committee is required even when the payment is not considered an “expenditure” under the Act. For example, recipient committees report payments made for newsletters, even though the payment may fall within the “newsletter exception” of regulations 18215(c)(9) and 1825(b)(4).

Additionally, under § 83113(a), the Commission has a duty to “prescribe forms for reports, statements, notices and other documents” required by the Act. Every committee is required to file periodic campaign statements under Chapter 4. (§ 84200 et seq.) Section 84211 provides that each “campaign statement” required under Chapter 4 must contain specified information. The term “campaign statement” is defined in § 82006:

“‘Campaign statement’ means an itemized report which is prepared on a form prescribed by the Commission and which provides the information required by Chapter 4 of this title.”

It was under this authority that the Commission adopted revisions to the Form 460 (Recipient Committee Campaign Statement) in June 2001 requiring committees to include certain types of information not expressly mandated by the Act but otherwise useful to the public’s understanding of committee activity. For instance, the Commission required committees to code contributions by type of contributor, and to disclose additional information related to Proposition 34’s contribution and voluntary expenditure limits. (Regulation 18421.4.)

There are other instances in which the Act and regulations require disclosure of payments that are specifically excluded from the terms contribution or expenditure. Section 82015(b) excludes payments received by elected officials for certain legislative, governmental or charitable events from the definition of contribution but still requires that payments of \$5,000 or more be reported. (§ 82015(b)(2)(B)(iii).) Pursuant to Commission regulation, payments made by a sponsoring organization for overhead and administrative services provided to its sponsored committee are not contributions but must be reported by the committee. (Regulation 18215(c)(16).) This exception has survived legal challenge. (*Californians for Political Reform v. Fair Political Practices Commission* (1998) 61 Cal.App.4th 472.) Under § 85312, payments made by political parties for member communications must be reported as if they were contributions or expenditures.

In more practical terms, excluding committee payments for member communications from reporting is troublesome. Section 84211(e) requires committees to disclose the balance of cash held at the beginning and the end of each campaign reporting period. The current Form 460 is structured so that every dollar received and spent is disclosed on one of the form schedules. The total reported on each schedule is carried over to the campaign statement summary page, where the committee uses these figures to calculate its cash balance at the end of the reporting period. For committees using software packages that provide both recordkeeping and reporting functions, excluding certain payments that must be used to calculate cash on hand balances will necessitate changes to software, and also perhaps to the Form 460 and the Secretary of State’s electronic filing formats. In summary, there are a number of statutory, regulatory, and practical rationales upon which the Commission may rely in requiring reporting of payments made by recipient committees for member communications.

Bracketed subdivision (d) provides for language that would be included if the Commission selects to include committees with the scope of § 85312's exception and it determines it is appropriate to continue to require recipient committee reporting of payments for member communications. Subdivision (d) states:

"If the organization is a committee organized under Government Code section 82103(a) and therefore already subject to the reporting requirements of Chapter 4 of this title, the payment is reportable as an expenditure in accordance with the requirements of Government Code section 84211, subdivisions (b), (i), (j) and (k)."

While not requiring a recipient committee to report member communications as contributions or independent expenditures to specific candidates or measures, this proposed subdivision would require these payments to be reported as expenditures "made" by the committee. Total costs associated with the communications would be reportable.

If the Commission includes subdivision (d), the staff recommends deletion of certain language in regulations 18215 and 18225 that describes the "newsletter exception." As noted above, under this exception, regularly published newsletters published by any group, including a committee, are not deemed a contribution or an expenditure. (Regs. 18215 and 18225.) Specifically, regulation 18225 currently provides:

"..., the term expenditure does not include costs incurred for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates or the qualification, passage or defeat of a clearly identified measure or measures by:

"(A) A regularly published newspaper, magazine or other periodical of general circulation, which routinely carries news, articles, and commentary of general interest.

"(B) A federally regulated broadcast outlet.

"(C) A regularly published newsletter or regularly published periodical, other than those specified in paragraph (b)(4)(A), whose circulation is limited to an organization's members, employees, shareholders, other affiliated individuals and those who request or purchase the publication...." (Reg. 18225(b)(4).)

As a result of this exception, a person making payments solely for these costs does not qualify as a committee under § 82013 by virtue of the payments; i.e., they do not trigger committee formation. Regulation 18215(c)(9) provides for a similar exception for contributions. As noted, under this exception, however, recipient committees report payments that meet the criteria under regulations 18215(c)(9) and 18225(b)(4).⁵

⁵ In contrast, independent expenditure and major donor committees ("(b) and (c) committees") do not disclose these payments. Since independent expenditure committees and major donor committees are created on a calendar

If § 85312 covered the same type of communications covered under the “newsletter exception” in the two regulations (18215 and 18225), it would be unnecessary to change these regulations. Since § 85312 is broader than the newsletter exception and covers other types of communications such as the ones described in subdivision (a) (special mailings, letters, and fliers), the existing “newsletter exception” regulatory language may cause confusion about which rule is applicable. Consequently, the Commission may wish to clarify that § 85312 is a broader exception than the newsletter exception by amending regulations 18215 to delete the language in subdivision (c)(9) and regulation 18225 to delete the language in subdivision (b)(4) as follows:

Decision 1 – Bracketed Language Rejected – Committees Included

Regulation 18215(c)(9) – Contribution Exceptions	Regulation 18225(b)(4) – Expenditure Exceptions
<p>(c) Notwithstanding any other provision of this section, the term “contribution” does not include:</p> <p style="text-align: center;">* * *</p> <p>(9) A payment by an organization for its regularly published newsletter or periodical, if the circulation is limited to the organization's members, employees, shareholders, other affiliated individuals and those who request or purchase the publication. This exception applies only to the costs regularly incurred in publication and distribution. Any additional costs incurred are contributions, including, but not limited to, expanded circulation; substantial alterations in size, style, or format; or a change in publication schedule, such as a special edition. A payment made by an organization to its employees, members, shareholders and their families pursuant to Government Code section 85312 and 2 Cal. Code Regs. section 18531.7.</p>	<p>Notwithstanding the provisions of this subsection, the term expenditure does not include costs incurred for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates or the qualification, passage or defeat of a clearly identified measure or measures by:</p> <p>(A) A regularly published newspaper, magazine or other periodical of general circulation which routinely carries news, articles and commentary of general interest.</p> <p>(B) A federally regulated broadcast outlet.</p> <p>(C) A regularly published newsletter or regularly published periodical, other than those specified in paragraph (b)(4)(A), whose circulation is limited to an organization's members, employees, shareholders, other affiliated individuals and those who request or purchase the publication. This paragraph applies only to the costs regularly incurred in publishing and distributing the newsletter or periodical. If additional costs are incurred because the newsletter or periodical is issued on other than its regular schedule, expanded in circulation, or substantially altered in style, size or format, the additional costs are expenditures. An organization to its employees, members, shareholders and their families pursuant to Government Code section 85312 and 2 Cal. Code Regs. section 18531.7.</p>

Alternatively, the Commission may determine that a committee is not contemplated by the statute to be an “organization” and, therefore, a committee has to continue to treat payments for member communications for purposes of the Act as it did prior to the enactment of § 85312. In other words, if the Commission excludes committees from regulation 18531.7’s definition of “organization,” the status quo would be maintained for committees. As explained in staff’s January memorandum, this would mean that recipient committees would continue to report all expenditures made by the committee and communications through regularly published

year basis, they are not required to report all of their ongoing financial activities. Payments that fall under the newsletter exception have never been deemed reportable for (b) and (c) committees. If a payment falls under the newsletter exception, the payment would not be “qualifying” and would not be reportable. (Regulation 18225; White Advice Letter, No. A-00-140; Bagatelos Advice Letter, No. I-87-234; Nielson Advice Letter, No. A-76-520.)

newsletters would not trigger committee formation for major donor and independent expenditure committees. In addition, payments made by committees for member communications would continue to be either contributions or expenditures for all other purposes of the Act.

If the Commission determines that § 85312 does not apply to committees, the existing newsletter exception would still apply to committees but the regulations would require some amendment to provide that the term “organization” in regulations 18215 and 18225 is defined differently for purposes of § 85312. (See chart.)

Regulation 18215(c)(9) – Contribution Exceptions	Regulation 18225 (b)(4) – Expenditure Exceptions
<p>(c) Notwithstanding any other provision of this section, the term “contribution” does not include:</p> <p style="text-align: center;">* * *</p> <p>(9) A payment by an organization, <u>other than an organization within the meaning of Government Code section 85312 and 2 Cal. Code Regs. section 18351.7</u>, for its regularly published newsletter or periodical, if the circulation is limited to the organization's members, employees, shareholders, other affiliated individuals and those who request or purchase the publication. This exception applies only to the costs regularly incurred in publication and distribution. Any additional costs incurred are contributions, including, but not limited to, expanded circulation; substantial alterations in size, style, or format; or a change in publication schedule, such as a special edition.</p>	<p>Notwithstanding the provisions of this subsection, the term expenditure does not include costs incurred for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates or the qualification, passage or defeat of a clearly identified measure or measures by:</p> <p>(A) A regularly published newspaper, magazine or other periodical of general circulation, which routinely carries news, articles, and commentary of general interest.</p> <p>(B) A federally regulated broadcast outlet.</p> <p>(C) A regularly published newsletter or regularly published periodical, other than those specified in paragraph (b)(4)(A), whose circulation is limited to an organization’s members, employees, shareholders, <u>other than an organization within the meaning of Government Code section 85312 and 2 Cal. Code Regs. section 18531.7</u>, and other affiliated individuals and those who request or purchase the publication. This paragraph applies only to the costs regularly incurred in publishing and distributing the newsletter or periodical. If additional costs are incurred because the newsletter or periodical is issued on other than its regular schedule, expanded in circulation, or substantially altered in style, size or format, the additional costs are expenditures.</p>

Decision 1 Staff Recommendation: Staff offers no recommendation on this decision point but again notes that excluding committees from the definition of “organization” could serve to avoid loss of committee reporting required by longstanding rules of the Commission. If the Commission decides to include committees within the definition of organization, staff recommends inclusion of the language of subdivision (d) to require reporting. Corresponding amendments to regulations 18215 and 18225 are also recommended.

Decision 2 – Decision 2 language would provide that an organization has members only if it is not operated for profit. Under the rules of statutory construction, significance should be given to every word, and construction making some words surplusage is to be avoided. (*Lambert Steel Co. v. Heller Financial, Inc.* (1993) 16 Cal.App.4th 1034, 1040.) Based on this principle, significance should be given to the identification of possible recipients in § 85312. As such, significance of the inclusion of the term “members” should be recognized. If the statute

were meant to only apply to profit making entities, then § 85312 could have merely included “employees” and “shareholders.” However, by using the term “members,” § 85312 appears to indicate that affiliation with an entity other than one operated for profit was intended. For this reason, **Decision 2** language is meant to limit organizations which have members to only those entities which are not operated for profit.

This option would exclude from coverage under § 85312 a business entity that, for profit making purposes, identifies as “members” a large base of customers who are eligible for certain discounts (like Costco), and to whom communication largely constitutes advertising to the general public.

Decision 2 Staff Recommendation: Staff recommends inclusion of the bracketed language that would limit organizations to entities that have members to those not operated for profit.

Regulation 18531.7(a)(1)(3) defines the term “member.” This definition is based on Federal Election Commission regulations defining “members.” The federal regulations were drafted for the purpose of limiting the persons who can lawfully be solicited for campaign contributions by a membership association, or who can be the recipients of a political communication from a membership association without the communication constituting a campaign expenditure. While § 85312 serves the different purpose of providing an exception to the definitions of “contribution” and “expenditure,” the federal regulations defining “members” include criteria useful for purposes of § 85312.

The proposed definition includes persons who have financial attachment to an organization and do not pay dues on a regular basis. For example, it covers persons who gain membership by virtue of a onetime payment. It also covers a more traditional type of member who pays membership dues on a regular basis. Finally, it would also cover persons who are construed as members without a monetary payment, where the member has a demonstrated organizational attachment.

Decision 3 – Significant Financial Attachment. **Decision 3** presents a criterion which differs from the FEC regulation. Rather than having a “significant” financial attachment, **Decision 3** presents language which provides a specific monetary threshold of \$2,000 indicating a bona fide financial attachment. This amount is used to identify business investments which are significant enough to be economic interests subject to the Act’s conflict-of-interest and disclosure rules. Staff believes that a level of financial attachment significant enough to trigger disqualification and disclosure rules is also an appropriate measure for financial attachment to a membership organization.

Decision 3 Staff Recommendation: Staff recommends using a monetary threshold to establish a financial attachment to a membership organization.

It is important to note that Regulation 18531.7(a)(2) provides a *de minimis* rule for small membership organizations of 25 or fewer members that do not have a formalized structure meeting the requirements specified in Regulation 18531.7(a)(3).

Additionally, subdivision (a)(4) clarifies that the criteria for membership provided in subdivision (a)(3) governs in determining whether a person who is on a mailing list or who is a contributor to a committee (if committees are governed by § 85312) is a “member.” The concern here is to give notice to organizations that mere inclusion in a mailing list or the making of a single contribution is insufficient to establish one’s status as a member. The bracketed language in subdivision (a)(4) should be selected if the Commission includes committees in the definition of organization.

Decision 4 – Shareholders. **Decision 4** presents the question of whether a shareholder must be an individual (natural person) as opposed to a “person” as defined by the Act. Section 82047 of the Act provides that “person” means an “individual” or a variety of business entities. Defining the term “shareholder” broadly to be a “person” pursuant to § 82047 could extend the exception of § 85312 to entities holding any equity interest in a corporation. By expressly identifying “families” of shareholders as recipients of communications, the plain language of § 85312 seems to indicate that a shareholder may only be a natural person.

Decision 4 Staff Recommendation: Staff recommends selection of the language that specifies that shareholders must be individuals.

Subdivision (b) – Calculating Payments For “Member Communications”

Subdivision (b) specifies which costs of a communication count as payments for communications. These include costs directly attributable to the communications such as salaries, production, postage, space or time purchased, agency fees, printing and administrative or overhead costs. Subdivision (b) also sets out a *de minimis* contact rule to prevent inadvertent violations.

Decision 5 – Recordkeeping. **Decision 5** has bracketed language that would be included if the Commission determines it is appropriate that an organization maintain detailed records to demonstrate compliance with the provisions of § 85312. Although the specific recordkeeping requirements are not included in the proposed regulatory language, it would require the maintenance of detailed accounts by all organizations. Without any requirements that an organization keep records documenting “member communications” which support or oppose a candidate or ballot measure, the Commission may be unable to verify whether the payments are governed by the statute. In addition, some members of the regulated community expressed a desire to include a “safe harbor” provision in the statute, and this language may serve that objective.

Decision 5 Staff Recommendation: The staff provides no recommendation on this decision but notes that such a recordkeeping rule may be helpful to effectively enforce against violations of § 85312.

Decision 6 – *De minimis* Contacts. **Decision 6** presents an option in the *de minimis* contacts rule set out in the regulation. It is foreseeable that individuals might receive a

communication not intended for them. This rule addresses unintended contacts. This language provides that a “payment for communications” includes costs for communications to persons who are not any of the intended recipients provided these costs do not exceed \$100 or 5% of the total costs of the communication. This *de minimis* rule is based on the Commission’s current Regulation 18961 regarding the incidental use of campaign vehicles, real property, appliances, or equipment for purposes other than political, legislative, or governmental purposes.

Decision 6 provides an option for determining whether to select the lower or higher resulting threshold amount. Selection of the term “lower” would make \$100 the cap for the *de minimis* amount. Selecting the term “higher” would allow for a cap that could exceed \$100 if the percentage threshold yielded that result. Using the higher threshold would seem to more readily accommodate organizations engaging in communications to many members for whom 5% of postage costs, for example, would quickly exceed \$100.

Decision 6 Staff Recommendation: Staff recommends selection of the term “higher.”

Subdivision (c) – Specific Payments Governed by § 85312

Subdivision (c) provides specific rules for determining whether a payment made in a certain manner is a contribution or expenditure under § 85312.

Decision 7 – Payments made at the behest of a candidate or committee. Subdivision (c)(1) further addresses the issue of whether the Act’s definition of “contribution” provided at § 82015 applies to payments for member communications. Subdivisions (b)(1) and (2) of § 82015 provide that a payment “made at the behest”⁶ of a candidate or committee is a contribution to the requesting candidate or committee. Therefore, ordinarily, when a candidate “behests” a person to make a payment to support that candidate, the payment is a contribution to the candidate. However, if § 85312 provides for an exception to this rule, arguably such a “behested” payment is not a contribution to the candidate. The proposed regulatory language in **Decision 7** allows the Commission to determine whether it considers such coordination to result in a contribution to the candidate or ballot measure committee that asks an organization to send to its members a communication benefiting that candidate or ballot measure.

The following examples illustrate how the proposed regulation including subdivision (c) (1) would operate if a “behested” payment *is* determined to be a contribution to the person requesting the payment:

Example 1: A civic service organization sends out a newsletter regularly to its members, but it will be sending a special edition to members in which they will run an ad featuring a candidate. Payments for this special edition are made by an individual to the organization at the behest of the candidate. Under the proposed regulation, payments made to the organization by

⁶ “Made at the behest of” means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of. Such arrangement must occur prior to the making of a communication described in Government Code Section 82031. (Regulation 18225.7.)

the individual at the behest of the candidate for these communications are contributions to the candidate and the organization is the intermediary.

Example 2: A chapter of a non-profit (501(c)(4)) entity is using its own general fund money (the entity has no PAC) to send out postcards supporting a ballot measure. The postcards will go only to the entity's dues-paying members. The mailing is done at the behest of the ballot measure committee formed to support the measure. Under the proposed regulation, payments made by the non-profit entity for these communications are contributions to the ballot measure committee.

Decision 7 Staff Recommendation: Staff makes no recommendation on this issue, but notes that if such payments are not contributions to the “behesting” candidate or ballot measure committee, the contribution and expenditure limits may be evaded. The Commission may wish to defer action on this issue until there is more experience with the statute and examples of potential or actual abuse are identified to determine if clear statutory authority exists as this section is analyzed in the context of other statutes such as the contribution limits.

Decision 8 – Earmarked Payments. Subdivisions (c)(2) and (3) both address earmarked third party payments. Subdivision (c)(2) generally addresses third party payments for member communications. Subdivision (c)(3) in particular addresses those payments for member communications which are made by third parties for the purpose of member communications (“earmarked payments”) *and* which are made at the behest of a candidate or committee.

To the extent that § 85312 provides an exception to the definition of “contribution,” it also acts as an exception to the Act’s contribution limits. Therefore, a possibility exists that this section may be used to circumvent these limits. For example, a person wishing to make a contribution in excess of the contribution limit to a candidate may give the excess amount to an organization to achieve the same goal as a contribution. (See below.)

Prohibited under § 85301:

Contributor → \$10,000 payment →	to Candidate for elective state office for purpose of sending mailers, which support candidate for state elective office, to members of large organization (such as Sierra Club or NRA)
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Permissible under § 85312 if proposed sections (c)(2) and (3) not included:

“Contributor” → \$10,000 payment →	to large organization for purpose of sending mailers, which support candidate for state elective office, to members of the organization
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To prevent persons from using § 85312 to undermine the contribution limits of the Act, subdivisions (c)(2) and (c)(3) provide that communications directed or paid for by third parties are not within the scope of the exception because the payments for these communications are not made by the organization itself.⁷

⁷ Here, it is important to distinguish between payments made by a third party to an organization for communications which support or oppose a candidate or ballot measure and those which are meant for member communications in

Decision 8 Staff Recommendation: Staff recommends inclusion of the bracketed language to prevent evasion of the contribution and expenditure limits.

Decision 9 - The Contribution Limit Resulting From The Interplay of Sections 85312 and 85303

In its January 2002 memorandum on member communications, staff also noted that there is difficulty relating to the interplay between §§ 85312 and 85303(b), when the payment for member communications is made to a political party. Section 85303(b) provides that:

“(b) A person may not make to any political party committee, and a political party committee may not accept, any contribution totaling more than twenty-five thousand dollars (\$25,000) per calendar year for the purpose of making contributions for the support or defeat of candidates for elective state office. Notwithstanding section 85312, this limit applies to contributions made to a political party used for the purpose of making expenditures at the behest of a candidate for elective state office for communications to party members related to the candidate’s candidacy for elective state office.”

Section 85303(b) may be read as applying only where the coordination is between the candidate for elective state office and the party for expenditures made by the party:

“Contributor” → \$25,000 → Political Party {coordination with candidate} → Party sends mailers supporting the candidate to registered voters with that party affiliation

The following example illustrates this interpretation: An individual makes a \$25,000 contribution (payment for political purposes) to a political party for member communications in general without specifying a particular candidate or ballot measure to be supported or opposed. Subsequently, a candidate for state elective office approaches and requests that the party conduct a phone bank contacting registered voters affiliated with that party to support the candidate. Under this interpretation of § 85303(b), the \$25,000 payment is not a contribution to the candidate since the candidate coordinated with the party, rather than the individual, to pay for communications to the registered voters.

general. Pursuant to the language of section 85312, only payments for communications for the purpose of “supporting or opposing a candidate or ballot measure” are governed by the statute; payments for unspecified member communications are not within the scope of section 85312.

On the other hand, § 85303(b) may be read to indicate that a candidate may coordinate with third persons to make contributions of up to \$25,000 *to* a political party, which are earmarked for that candidate:

<p>“Contributor” {coordination with candidate → \$25,000 → Political Party → to make contribution for purpose of Party’s sending mailers supporting the candidate}</p>	<p>Party uses \$25,000 payment to send mailers supporting the candidate to registered voters with that party affiliation</p>
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Under this second interpretation, a conflict would arise between the application of § 85303(b) and the contribution limits of § 85301 which prescribes a limit of \$3,000 for certain persons.⁸ It is most consistent with the provisions of 85301 to construe § 85303(b) to refer to the situation where a candidate coordinates only with a political party, rather than a third person, to make expenditures to communicate with registered voters affiliated with that party.

Decision 9 Staff Recommendation: Staff provides no recommendation on this decision point but believes that additional guidance from members of the public and the regulated community will prove helpful in determining whether, in practice, third party payments for member communications will pose a significant threat to the Act’s contribution limits.

Attachment – Proposed Regulation 18531.7

Legal:Commemomarch7.doc

⁸ Section 85301(a) provides that a person, other than a small contributor committee or political party committee, may not make to a candidate for elective state office, other than a candidate for statewide elective office, a contribution totaling more than \$3,000 per election.